No. 10,969

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of:
RALPH SWIHART,
Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz Island, California,
Appellee.

APPELLANT'S OPENING BRIEF.

RALPH SWIHART,
Box P.M.B. 590 AZ, Alcatraz Island, California,
Appellant in Propria Persona.

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STATEMENT OF JURISDICTIONAL FACTS.

This proceeding was initiated on August 24, 1944, by the filing, with the United States District Court, for the Northern District of California, Southern Division, of a petition for a writ of habeas corpus (T. 2), by Ralph Swihart, the appellant herein.

On October 3, 1944, the said District Court entered its order denying appellant's application for the writ (T. 30). Appellant has appealed from said order, and this brief is in support of his appeal.

The petition was filed in the said District Court pursuant to the provisions of Title 28 U.S.C.A. Section 451 et seq., conferring powers on the Federal District

Courts to issue writs of habeas corpus, and pursuant to those of Title 28 U.S.C.A. 452, conferring powers on the several judges of the District Courts to grant said writs for the purpose of inquiring into the cause of restraint of liberty.

RELIEF MAY BE HAD BY HABEAS CORPUS, WHERE STATUTORY PROCEEDINGS DISPENSING WITH TRIAL BY JURY, IN VIOLATION OF THE CONSTITUTIONAL GUARANTY, since this constitutes a DENIAL OF DUE PROCESS OF LAW.

C. J. S. 39, Section 29, page 520, Note 67;
C. J. 29, page 48, Note 88.

Habeas corpus is the proper remedy—

"Where a JUDGMENT of CONVICTION and sentence are had WITHOUT DUE PROCESS OF LAW." (Emphasis supplied).

Voight v. Webb, 47 F. Supp. 743;
In re Monroe, 46 F. 52;
C. J. S. 39, Section 26, Note 22, at page 488.

Habeas corpus is the proper remedy where constitutional rights were denied in the trial court, such proceeding invalidates the judgment.

Mitchali v. Youell, 130 F. 2d 880;
Boyed v. Hudspeth, 126 F. 2d 585;
Casebeer v. Hudspeth, 114 F. 2d 789.

The appellate jurisdiction of this court is derived from the provisions of Title 28 U.S.C.A., Section 463, providing that in a proceeding in habeas corpus in a District Court, the final order shall be subject to review

on appeal by the Circuit Court of Appeals of the circuit wherein the proceeding is had. Such appellate jurisdiction was invoked by appellant by the filing of a notice of appeal (T. 47), under the procedure established by Rule 73 of the Federal Rules of Civil Procedure, and rendered applicable to appeals in habeas corpus proceedings by Rule 81 of said Rules. The filing of the said notice of appeal was made within the time fixed by the provisions of Title 28 U.S.C.A., Section 230; the entry of the order of the said District Court denying the petition (T. 30) having been made on October 3, 1944, and appellant's notice of appeal (T. 47) having been filed on December 7, 1944.

STATEMENT OF THE LAW AND THE QUESTIONS INVOLVED.

Appellant was charged, in an indictment (T. 6), filed in the United States District Court for the Eastern District of Oklahoma, with violation of Title 18 U.S.C.A. Section 409. Said indictment, containing two counts charged, *inter alia,* breaking the seals of a freight car containing interstate commerce.

Upon a plea of not guilty, and WITHOUT ENTERING A COMPETENT, INTELLIGENT, OR VOLUNTARY WAIVER OF HIS CONSTITUTIONAL RIGHT, TO TRIAL BY JURY, was declared guilty by the then presiding District Judge, Alfred P. Murrah, who promptly sentenced appellant to ten years on each count, sentences to run consecutively and to this day he stands committed.

Upon August 24, 1944, the appellant filed in the United States District Court for the Northern District of California, Southern Division, a petition for a writ of habeas corpus, alleging that he was unlawfully restrained of his liberty by imprisonment in the United States penitentiary at Alcatraz Island, California, under the custody of the respondent, James A. Johnston, warden of said penitentiary in violation of that portion of the Fifth Amendment to the United States Constitution, which provides that all judicial action shall be by due process of law. This situation was created when he PLEADED NOT GUILTY—YET HAD NO JURY TRIAL, CONSTITUTIONALLY GUARANTEED BY ARTICLE III, SECTION II, CLAUSE III, of the original Constitution, and reiterated in the SIXTH AMENDMENT to the United States Constitution.

On October 3, 1944, the said District Court denied appellant's application for the writ (T. 30). Therefore, the only issues raised by this appeal are:

(1) Did the United States District Court, for the Northern District of California, Southern Division act in conformity with, and adhere to statutory law, in permitting counsel for respondent to substitute a "motion to dismiss" in place of the return to the order to show cause?

(2) Is it within the judicial ambit and statutory law, for a United States Federal Court to deny the application for a writ of habeas corpus, without any adjudication whatsoever upon the issue raised?

(3) The fact, fully verified by the record (T. 10-14) that appellant PLEADED NOT GUILTY, YET HAD NO TRIAL BY JURY, which is expressly guaranteed by the United States Constitution, and where the RECORD FURTHER SHOWS he did not make a COMPETENT, INTELLIGENT, OR VOLUNTARY WAIVER THEREOF; can it be lightly brushed aside in an application for a writ of habeas corpus as having "no merit".

ASSIGNMENT OF ERRORS.

Assignment Number I.

The United States District Court for the Northern District of California, erred in permitting counsel for respondent to interpose a "motion to dismiss", when respondent was ordered to make the return to the order to show cause.

Assignment Number II.

The court below erred by circumventing the issue raised in the petition for writ of habeas corpus, by referring to a prior application, when the points raised in that application had no similarity to the contention in the present petition.

Assignment Number III.

The court below erred in failing to determine appellant's contention as to whether he competently, intelligently and voluntarily WAIVED HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

SUMMARY OF POINTS ON APPEAL.

Appellant contends that he was arbitrarily convicted, without due process of law, expressly in violation of the Fifth Amendment to the United States Constitution; in that he pleaded not guilty, yet had no trial by jury, nor did he competently, intelligently or voluntarily waive that constitutional right (T. 14).

Appellant further contends that in his application for the writ of habeas corpus it was the duty of the District Court, and devolved upon the judicial function thereof, to determine the issue therein, as law and justice require.

He endeavors to show, in the following three points, that manifest error was committed by the United States District Court, for the Northern District of California, Southern Division, in denying him the relief prayed for, in his original petition for the writ of habeas corpus.

ARGUMENT.

POINT I.

On August 24, 1944, there was filed, in the United States District Court, Northern District of California, Southern Division, a petition for a writ of habeas corpus on behalf of appellant (T. 2).

The respondent, James A. Johnston, warden, was ordered to appear before the above named court on September 2, 1944 (T. 16), to show cause, if any he had, why a writ of habeas corpus should not issue therein as prayed for in the application.

The respondent asked for, and was granted, a continuance until September 16, 1944, on that date, instead of the return to the order to show cause, which the court had ordered the respondent to produce, the respondent and his legal representative substituted a motion styled "Motion to dismiss petition for writ of habeas corpus" (T. 17), in total disregard of the statutes governing habeas corpus proceedings. Section 456 of Title 28 U.S.C.A. provides in part (T. 35-36):

> "Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles * * *."

It is understood the above was designed to remedy procrastination and trifling with the writ.

In Section 457 of the same title we find:

> "The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party."

Failure to obey the command of the writ constitutes contempt of court, and an attachment will issue to compel obedience, *Ex parte Young,* 50 F. 526; *U. S. v. Bollman,* F. Cas. 14, 622.

> "Disobedience of a writ of habeas corpus by the person against whom it is directed, such as the neglect or refusal to produce the prisoner or make a return, or the making of a false, impertinent, or evasive return, constitutes a contempt of court * * *."
>
> *C. J. S.* 39, Section 96, page 661.

There is no basic reason, nor can any authorities be found, to sanction the procedure invoked by counsel for respondent. We wish to add that such procedure does not facilitate nor dispose of an issue, but tends to complicate and hold in flippancy the scope and purposefulness of the statutes governing habeas corpus proceedings.

Appellant is of the belief, and the authorities bear him out, that the court should not have allowed a motion to interpose between the order to show cause and the return thereto. This was duly and emphatically objected to by appellant in memorandum of petitioner (T. 19-32).

In general, a return must be made to the order to show cause in accordance with the command of the writ and required by statute.

Ex parte Gutierrez, 36 P. (2d) 712, 1 Cal. App. (2d) 281;

Bagley v. Young, 134 P. (2d) 1098.

When an order of a court of competent jurisdiction is issued, it is presumed such must be carried out in pursuance to that court's instruction. If this were not so, and strictly abided by, the courts could not maintain their established degree of dignity and respect. If the party so ordered by a federal court, disregards any order emanating from such court, it is manifest he can be cited for contempt of that particular court. Therefore, when the Honorable District Judge, Louis E. Goodman, ordered the respondent to make a return to the order to show cause, which he

failed to do, was it not disregarding an order of that court? Was it not statutorily wrong for the court to sanction such procedure by allowing the respondent to eliminate this part of habeas corpus proceedings and prematurely having the petition for the writ denied?

POINT II.

In the memorandum of opinion denying the petition for the writ of habeas corpus (T. 30), the court said:

> "* * * the doctrine of res adjudicata does not apply in habeas corpus proceedings, nevertheless the court may deny the petition in reliance upon a prior refusal to issue a writ to the same applicant—Salinger v. Loisel, 265 U. S. 224; Mothershead v. King, 57 Fed. Supp. 210. Furthermore the issue raised herein could have been disposed of in case No. 23016-R, but was abandoned."

Appellant in his memorandum in opposition to respondent's motion to dismiss (T. 19), in no uncertain language made known to the court that his second petition for the writ, was in no way connected or similar to the first writ for which he applied. In truth and reality the two petitions, in the former and present are totally, factually and absolutely, unrelated on any point of the contentions embodied in either, and by no means is the issue *res judicata.* The contention in this latter petition has not been ruled upon by the United States District Court for the Northern

District of California in the prior nor the present action.

In order to further establish this assertion we refer to the memorandum of opinion handed down in that case by the Honorable Michael J. Roche (page 4) (T. 41).

Mr. Zirpoli questioning the petition:

"Q. Do you now contend that you waived your jury trial because of the fact that probation had been granted to you in the event you did that?

A. (Petitioner). I do not raise that point in my petition.

Q. Then you are not raising that point in your petition and you are not raising that point before the court now?

A. NO."

This plainly proves beyond doubt the issue of TRIAL WITHOUT A JURY WAS NOT A PART OF PETITIONER'S PRIOR CONTENTION. The fact of the matter is such an assertion occurred in the petition in case No. 23,016-R, under the heading "Statement of Fact", which begins on page two of the petition in that case. This was a statement made by petitioner's attorney, and still is believed to be true, whether it was a true or erroneous statement by counsel; appellant cannot say. It should not, for that reason, be pyramided as any issue, since it occurred under the "Statement of Fact". It could hardly be construed as an allegation of appellant's contention; since it was promptly denied as being such when Mr. Zirpoli, counsel for respondent, raised the question (see above and also T. 44 desig. 5).

Appellant did not appeal from the denial of his first petition for the writ truthfully because the United States District Court for the Northern District of California subverted the issue and created five allegations, wherein there was but one. Appellant in applying for the writ was sincere in his endeavor to set down all the facts and circumstances to enable the court to obtain a comprehensive view and thorough understanding of the case. The reward for this diligence was a deliberate raising by counsel for respondent of at least five points of contention, wherein there was but one. The result of that proceeding developed into a bedlam of scrambled contentions and confusion, which one could not, within reasonable limitations appeal to an appellate court.

Honorable Judge Roche said in case No. 23,016-R: "The petition is quite lengthy and extremely difficult to understand (T. 42 top)."

In the order denying the second application (T. 30), the Honorable Louis E. Goodman said: "Furthermore the issue raised herein could have been disposed of in case No. 23,016-R, but was abandoned". Is it possible to settle a question or issue that is not raised in a petition?

In the identical case the court quoted against appellant appears the following:

> "* * * The process to obtain a writ of habeas corpus is not to confuse, or mislead, but get at the issue. * * * as it is now, one record is largely a duplication of what appears in the other and both are exceedingly confusing. The course that

was taken should not have been selected, nor should the court have permitted it."

Salinger v. Loisel, 44 S. Ct. 521, at page 521 desig. 230.

By the great preponderance of authority the principle of *res judicata* has no application to habeas corpus proceedings where there is a refusal to discharge; a decision on one writ is no bar to subsequent proceedings.

The United States Supreme Court said in *Winder v. Coldwell,* 14 How. 434, 14 L. Ed. 487:

"Whether this is the second or twenty-second application, however, is immaterial. Under the Statutes as they stand, it seems to be left for the petitioner alone to determine, not only how many times he will apply for the writ and whether he will appeal from its denial * * *."

In habeas corpus proceedings it is a duty devolving upon the judge to "get at the facts of the issue and determine the accuracy thereof". In the instant case this was not done, instead reliance was placed upon a prior petition, wherein no such issue was alleged. The Honorable Judge Louis E. Goodman said (T. 31) petitioner had "no regard for the truth", which seemed to be a convenient exit, or shirking of the statutory requirements. It is natural when an allegation is not made that a petitioner would offer no evidence thereto. The "no jury trial" allegation appeared in petitioner's last application for the writ of habeas corpus, and no attempt was made to ascertain

the truth or falsity of the trial court records, which should have been determined (T. 10).

It is believed by the weight of authority that the United States District Court for the Northern District of California erred in the first instance:

(1) By not compelling respondent to make a return to the order to show cause;

and (2) in refusing to make a determination upon the issue presented.

SUMMARY OF POINT III.

Appellant proposed to show that he did not COMPETENTLY, INTELLIGENTLY, NOR VOLUNTARILY WAIVE HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY. The facts plainly show that he did not know, or was he informed of the consequences contingent upon such unsanctioned procedure.

Therefore, but one issue was raised by his contention.

Was appellant accorded his constitutional right to trial by jury? The records of the trial court plainly show that he did not have a trial by a jury, in spite of the fact that he pleaded not guilty. The record does purport to show this right was waived, but it does not show that it was intelligently waived.

The authorities quoted in the following point positively, and definitely, hold one cannot waive his con-

stitutional right to trial by jury, in a criminal case, unless that is done by express stipulation in writing; which is the only means of making a competent and intelligent waiver.

POINT III.

The certified docket entries of the trial court (T. 10), purport to show appellant in "open court waived trial by jury." If this be a fact, the same record, would of a necessity, show a stipulation in writing, signed by appellant and approved by the court, agreeing to such unsanctioned procedure? We must confess that the record is totally barren of any such waiver in writing (T. 14.) The rule has been rigidly invoked by the United States Supreme Court in the three leading cases to come before them (*Schick v. United States; Patton v. United States; Adams v. United States,* infra), that the record must show a signed waiver by the defendant, approved by the court for the waiving of the constitutional right to trial by jury. That it was a necessary implement to guarantee the fulfilment of due process of law.

The same entries (T. 10), charge larceny of an interstate shipment; that indictment (T. 6), does not allege any such fact. The same entries do not show one, partial, or bit, of any exhibit offered by the government in the trial of this cause; nor does it show the express statutory requirement in such a case (Title 18 U.S.C.A. Section 411), without which a conviction cannot be

had, unless that is the government's chief exhibit, to establish the interstate character of such an alleged offense. (T. 15.)

In the petition for the writ (T. 2), it was alleged, no competent, intelligent or voluntary waiver was made, nor was there any waiver, nor stipulation thereto, made in writing.

This brings us to the all important query as to what constitutes a competent, intelligent and voluntary waiver?

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."
>
> So defined in *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019; and in Webster's New International Dictionary, Second Edition, we find the three words:
>
> "A—Competent:
> Answering to all requirements; adequate; sufficient; suitable; capable; qualified; fit.
>
> B—Intelligent:
> Endowed with intelligence or intellect, (2d) possessed of, or exhibiting, a high or fitting degree of intelligence or understanding.
>
> C—Voluntary:
> Proceeding from the will, or from one's own choice or full consent."

In summing up the substantive implication in A—B—C— We find this appellant could not have, under

the circumstances, met the degree of qualification prerequisite to the requirement of A, B, C, for these visible reasons:

1. He did not make an adequate, sufficient, suitable, capable, qualified, or fit waiver of a jury trial.

2. He was not endowed with that degree of intelligence, or possessed of, or exhibiting a high or fitting understanding of the issue involved to sufficiently remonstrate at the denial of trial by jury.

3. He did not waive a jury trial, proceeding of his own volition, or from his own choice or consent.

We then find in a comparative analysis with the view adopted by the United States Supreme Court, who have held one could waive a known constitutional right, if the same is done in, "a competent, intelligent and voluntary manner," that this appellant did not make, or enter into, any such waiver, nor by the widest stretch of the imagination could one distort the facts and claim the contrary.

> "The question in each case is whether the accused was competent to exercise an intelligent, informed judgment * * *."
>
> *Adams v. United States,* 63 S. Ct. 241.

If we were to assume the jury was waived in writing, a presumption wholly unsupported by the record

(T. 10, 14), then and only then, could it be said an intelligent waiver was made. An invisible record, beyond proof, under such circumstances nevertheless true, and demonstrated to by the facts of the case, show some sort of waiver was made by counsel and the Court regarding the appellant's constitutional right to "trial by jury." which was beyond the comprehension of appellant.

The severe sentence imposed by the Court; the harsh language used and the denial of appellant's witnesses to testify, cannot be said that an intelligent waiver was made by this appellant.

The power of a judge to pass upon questions of law is just as much an essential part of the process of trial by jury in criminal law, as are the powers of the jury to pass upon question of fact. In such a trial in a Federal Court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function of federal law is an essential factor in the process for which the United States Constitution provides, and it distinctly does not provide that a person shall be denied the right to trial by jury in a criminal cause, when such right is fully guaranteed by Article III, Section II, Clause III of the United States Constitution.

We stress this matter because of the grave importance of fact finding. The finding of fact by the trial court was haphazard, conjectural and not based upon any proof (T. 15).

Facts found without due care as well as unscrupulous fact-finding is not, as a rule, condoned by the federal courts, but we must confess the trial Court, in the instant case, if the records are to be relied upon, certainly, and perhaps deliberately, went far astray from judicial principles in vogue within the federal courts, to obtain the conviction of this appellant before a one man jury.

When a federal trial judge sits without a jury, which has not competently, or intelligently been waived, and determines the facts upon a generalization of "his beliefs," and perhaps a "dislike of the defendant," you would have a realistic performance of arbitrary power as exercised in isolated cases. Such unsanctioned procedure can only be corrected upon a retrial of those issues denied in the first instance. Appellate Courts have power to remand such a voidable conviction not inconsistent with their conclusiveness.

To determine the precise degree of prejudice sustained by appellant as a result of such compulsory waiver, one need only look at the judgment entered and sentence imposed which is cruel and inhuman, considering the insufficiency of evidence as a whole. A defendant who has been wronged by being judged without the appliance of his constitutional right is entitled to an adjudication upon those issues.

The trial court's failure to inform appellant of his constitutional right to trial by jury, subsequent to the calling of the case for trial, was in violation of Article III, Section II, Clause III and plainly stated in the Sixth Amendment, and not aligned with due process

of law as defined in Amendment Five of the United States Constitution.

It is a fact that the right involved is of such a fundamental and inherent character, it cannot be dispensed with, without violating those preceptible principles of liberty and justice, which are the foundation of all our civil and political institutions.

Yet the facts are plainly evident the trial court lightly brushed this basic right aside in zealous haste for a conviction, in utter disregard of a citizen's right, or "just recourse to the law."

The Sixth Amendment to the United States Constitution guarantees that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury."

This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. It being considered of such paramount importance that the original framers of the United States Constitution incorporated it in Article III, and later Congress inserted it in the Sixth and Seventh Amendments respectively, to triply insure against its abuse, or oversight. It stands thus, as a silent sentinel, a constant vigilance admonishing the courts to dispense justice as ordained in its mandates, and that if the constitutional safeguards it provides be circumvented, by vague calculations of hypothetical inferences, justice then will have been lost, and constitutional meanings will have become

ubiquitous inferences interchangeable with momentary needs.

The principles laid down in this historic document (the Constitution of the United States), embodies a realistic recognition of the obvious truth—that one charged with a crime, however intelligent, able and forward he may be, is not to be permitted to waive the inherent command, "the right of trial by jury shall be preserved", it does not appear to be intricate, complex or mysterious, and the right would be of no avail if a court could wantonly disregard such a mandate at will.

It is believed that the Sixth Amendment withholds from Federal Courts, in all criminal proceedings, the power and authority to deprive an accused of life or liberty unless such rights, after being informed by the court, are competently, intelligently and freely waived. The constitutional right of accused to a trial by jury, where he pleaded not guilty, and did not competently waive such right, invokes of itself, the protection of a trial court. This protecting duty imposes the weighty responsibility upon the trial judge of determining whether there has been an intelligent and competent waiver made by the accused, it would seem to be fitting and appropriate for such determination to appear upon the record; (*Dillingham v. United States,* infra).

If this requirement of the Fifth Amendment (lack of due process of law), and the requirement of Article III, Section II, Clause III and Amendment Six, are not complied with, the court no longer has jurisdic-

tion to proceed, making the judgment of conviction pronounced by such a Court absolutely void, and one imprisoned thereunder may obtain release by habeas corpus. *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. at page 1024 (9, 10); *Macky v. Miller,* 121 F. 161; *Roberson v. Johnston,* 118 F. 2d 998.

There may be some insistence that appellant waived his constitutional right to trial by jury, but we submit that the trial court cannot so show, nor do the records (Docket entries and exhibit (T. 10-14)), disclose any such waiver, in writing, or by consent of this appellant. It should be pointed out here that:

> "Courts should indulge every reasonable presumption against a waiver of fundamental constitutional rights and see if such acquiescence is justified by the facts of the case."

The determination of whether there has been an intelligent waiver in any particular case must devolve upon the particular facts surrounding the circumstances of each individual case.

To preserve the protection accorded by the bill of rights for hard pressed defendants, the Courts are presumed to indulgently scrutinize, with meticulous care, the waiver of a constitutional right. No semblance of any such solicitude for the protection of his rights, was shown for this appellant, by the trial court, nor was he informed of the consequences, thereupon. Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. No such concern on the part of the trial court for the basic rights of appellant is

disclosed by the record. To the contrary, notwithstanding, it is totally silent as to an intelligent and competent waiver (in writing or orally made by this appellant), and similarly silent as to being informed of the consequences contingent upon the waiving of trial by jury.

Speaking of the obligation of the trial court to preserve the right to jury trial for an accused Mr. Justice Sutherland said that such duty—

> "Is not to be discharged as a mere matter of rot, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from any of the essential elements thereof, and with a caution increasing in gravity."
>
> *Patton v. United States,* 281 U.S. 276, 312, 313, 74 L. Ed. 854, 869, 870, 50 S. Ct. 253, 70 A.L.R. 263.

AUTHORITIES IN SUPPORT OF APPELLANT'S ARGUMENT.

Appellant desires to submit, not in the order of their importance, but in chronological sequence, the leading, and we feel controlling authorities directly in point with appellant's contention.

> *Callan v. Wilson,* 127 U.S. 540, 557, 32 L.Ed. 223, 228, 8 S. Ct. 1301, 1307,

which was a criminal prosecution by information in the police court of the District of Columbia. The accused claimed the right of trial by jury was secured to him

by the Third Article of the Constitution, as well as the Fifth and Sixth Amendments. The contention of the Government that the accused was not entitled to trial by jury was overruled, the United States Supreme Court saying:

> "As the guaranty of a trial by jury, in the third Article, implied a trial in that mode, and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property."

The court further said at page 1307—8 S. Ct.:

> "Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority, of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged."

This decision has been cited thirteen times since its rendition; it has never been modified, reversed, limited, or expressly overruled; it was cited and approved in *Thompson v. State of Utah;* the case following.

In *Thompson v. State of Utah,* 170 U.S. 343, 18 S. Ct. 620, wherein Thompson and a co-defendant were found guilty of grand larceny by a jury of twelve while Utah was still a territory. A new trial having been granted, the case was remanded for trial to another county. But is was not again tried until after the admission of Utah into the Union as a state.

At the second trial the defendant was found guilty. He moved for a new trial upon the ground that the jury who tried him was composed of only eight jurors; whereas by the law in force at the time of the commission of the alleged offense, a lawful jury in his case could not be composed of less than twelve jurors. The judgment of conviction was affirmed by the Supreme Court of the State of Utah, holding that the conviction by a jury of eight persons was consistent with the Constitution of the United States (50 Pac. 409).

The case was appealed to the United States Supreme Court who reversed for the following reasons:

> "By the statutes of the territory of Utah in force at the time of the commission of the offense it was provided that a trial jury in a district court should consist of twelve—unless the parties to the action or proceeding, in other than criminal cases, agreed upon a less number; that a felony was a crime punishable with death or by imprisonment in the penitentiary, every other crime being a misdemeanor:—that no person should be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty—a jury having been waived in a criminal action not amounting

to a felony; and that issues of fact should be tried by jury. * * *

"* * * When Magna Charta declared that no freeman should be deprived of life, etc., but by the judgment of his peers or by the law of the land, it referred to a trial by twelve jurors. Those who had emigrated to this country from England brought with them this great privilege.

'As their birthright and inheritance, as a part of, that admirable common law which had fenced around and interpreted barriers on every side against the approaches of arbitrary power.'

"It must consequently be taken that the word 'jury' and words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offense of grand larceny in the territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.

"The natural life, says Blackstone, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.

"1 Bl. Comm. 133. 'The public has an interest in his life and liberty neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceed-

> ings involving the deprivation of life and liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.
>
> "The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion."

This case has been cited innumerable times, and has never been modified, reversed, limited, expressly overruled, or publicly criticized, nor questioned. It has been distinguished and is much in prominence, in *Patton v. United States,* infra.

The next case in point with appellant's contention seems to be:

> *Schick v. United States,* 195 U.S. 65, 24 S. Ct. 826.

While it is true the plaintiffs in error were severally prosecuted by information in the District of Northern Illinois, only upon a petty offense in which proceeding they, IN WRITING, WAIVED THE RIGHT TO JURY TRIAL, yet the United States Supreme Court said on page 826:

> "The waiver of a jury was not assigned as error, nor referred to by counsel at the hearing before us, either in brief or argument. The question of its effect upon the judgment was suggested by this court, and briefs were called for from the respective parties.
>
> "In such a case there is no constitutional requirement of a jury. In the 3rd clause of Section

2, Article 3, of the Constitution, it is provided that—

"'The trial of all crimes, * * * shall be by jury'; and in Article 6 of the amendments, that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *.'

"In the light of this definition we can appreciate the action of the convention which framed the Constitution. In the draft of that instrument, as reported by the committee of five, the language was '* * * the trial of all criminal offenses * * * shall be by jury', but by unanimous vote it was amended so as to read—'the trial of all crimes'. The significance of this change cannot be misunderstood."

And on page 828 the court continues:

"There is no public policy which forbids the waiver of a jury in the trial of petty offenses.

"In all prosecutions within the jurisdiction of said court, in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court, expressly waive such trial by jury, and request to be tried by the judge * * *. In all cases where the accused would not, by force of the Constitution of the United States, be entitled to trial by jury, the trial shall be by the court without a jury, unless * * * imprisonment as punishment for the offense may not be thirty days or more, the accused shall demand a trial by jury, in which case the trial shall be by jury."

In the dissenting opinion of Mr. Justice Harlan in this case at page 829 we find:

> "Upon the face of the record the question arises whether the court below, without the aid of a jury, had jurisdiction to ascertain the facts, and, finding the defendants severally guilty of the offense charged, to impose upon each the fine prescribed by the statute.
>
> "So, in ascertaining whether, under any circumstances, a criminal case may be tried in a Federal court without a jury, * * * the accused pleading not guilty, * * * We must inquire whether the Constitution forbids such an exercise of authority by the court, without a jury. If it does, that is the end of the matter; if it does not, then, and then only, may we look to such usage and modes of proceeding as existed at the common law for the trial of crimes before the adoption of the Constitution.
>
> "Proceeding on that basis, we have seen that the Constitution expressly requires that the trial of all crimes, except impeachment, shall be by jury; and we assert, with confidence, that no precedent can be found at common law for the trial by the court, without a jury, of any crimes except those described in adjudged cases and by elementary authorities as minor or petty offenses involved in the internal policy of the State, and those could be tried summarily by some court or officer, without the intervention of a jury, * * *."

and on page 832 Mr. Justice Harlan continues in no uncertain language:

"What the Constitution requires is that the trial of a crime shall be by jury. If the accused pleads not guilty, there must, of necessity, be a trial; for by that plea he puts 'himself on his country, which country the jury are', he contests, by that plea, every fact necessary to establish his guilt; he is presumed to be innocent; nothing is confessed; and the facts necessary to show guilt must be judicially ascertained, in the mode prescribed by law, before any judgment can be rendered, but the vital inquiry is, in what way, when defendant pleads not guilty, are the facts to be ascertained, and the plea of not guilty overcome? Under the express words of the Constitution the answer must be: by trial before a jury of twelve persons, organized to determine whether the charge of guilt be true; the function of the court being simply to conduct the trial, and render a judgment in accordance with the verdict of the jury, not separately, but together, constitute the appointed tribunal, which alone, under the law, can try the question of crime, the commission of which by the accused is put in issue by a plea of not guilty."

While it is true this case has been affirmed, but the Court so ruled, by the appearance in the record of the WAIVER, SIGNED IN WRITING, BY THE PLAINTIFFS, WAIVING THEIR CONSTITUTIONAL RIGHT TO TRIAL BY JURY. That one also could waive such right in a petty offense.

The case has been cited with approval numerous times, and nowhere do we find any criticism against the opinion expressed therein; particularly upon the

point—"TRIAL BY JURY". It seems to fully apprehend the edicts embodied in Article III, and the Sixth Amendment to the United States Constitution.

Undoubtedly the longest case of record direct in point with appellant's contention is:

Freeman v. United States (C. C. A. 2d, 1915), 227 Fed. 732.

The defendants by a writ of error appealed claiming as error, among other things, that he did not have a trial by a jury—page 742, 227 Fed. The trial in many respects was a remarkable one, lasting four months; the record is contained in ten large volumes of 7000 printed pages. Rogers, Circuit Judge, delivered the opinion of the court. Speaking upon the subject—"trial by jury * * *" We quote in part page 742:

> "The Constitution of the United States as originally adopted provides in the third article as follows:
>
> 'The trial of all crimes, except in cases of impeachment, shall be by jury.'
>
> "The first Congress, however, in September 1789, proposed to the Legislature of the several States ten amendments, which were promptly ratified. The Fifth Amendment provides that:
>
> " 'No person shall be * * * deprived of life, liberty, or property, without due process of law.'
>
> "The Sixth Amendment provides that:
>
> " 'In all criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury.'

"All the above provisions operate simply as restraints and limitations upon the powers of the Government of the United States. But as the State Constitution also secure to persons accused of crime a right to a trial by jury under provisions more or less similar, the decisions of State Courts, as well as those of the Federal Courts, may be consulted in seeking to discover the meaning of the constitutional guaranty.

"The right to trial by jury has been placed in this country upon what Mr. Justice Story in his commentaries calls 'the high ground of constitutional right', and he declares that the inestimable privilege of trial by jury is conceded by all 'to be essential to political and civil liberty'. The right is one justly dear to our people, and as a social, political, and judicial institution it is deserving of the solicitude with which it has been regarded by all Anglo-Saxon people.

"The defendant is accused of a crime for which he is entitled to trial by jury within the meaning of the third article of the Constitution of the United States. The Supreme Court in Callan v. Wilson, 127 U.S. 540, 8 S. Ct. 1301, 32 L. Ed. 223 (1888), construed that article as embracing, not only felonies punishable by confinement in the penitentiary, but also some classes of misdemeanor, the punishment of which may involve the deprivation of the liberty of the citizen.

"The Supreme Court of the United States has expressed the same idea. In Capital Traction Co. v. Hof, 174 U.S. 1, 13, 19 S. Ct. 580, 585, 43 L. Ed. 873 (1889), the court said:

" 'Trial by jury, in the primary and usual sense of the term at the common law and in the

American Constitution, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law of the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion.' "

Circuit Judge Rogers continues on page 744—227 Fed.:

"It being settled that an accused is entitled under the Constitution to trial by jury, and that trial by jury involves in the federal courts a trial by twelve men presided over by a judge, it is necessary to consider whether one accused of crime can consent or waive his constitutional rights as to the tribunal by which he is to be tried.

"As the Constitution specifically declares that 'the trial of all crimes * * * Shall Be By Jury', it is difficult to see how it can be maintained that the trial of a crime in a federal court need not be by jury, provided the accused person consents to be tried in some other manner. The question of how he shall be tried does not seem open to his determination but appears to have been settled for him by the mandatory provision of the Con-

stitution of the United States, however it might be under the Constitution of a State differently worded. It is necessary, too, to have in mind that the trial of one charged with crime, affects not merely the rights of the accused but the public interest * * *.

"The Declaration of Independence declares that all men are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. In his great work on constitutional limitations, p. 576, Judge Cooley, discussing waiver of rights, said that:

" 'Consent in a criminal case cannot bind the defendant "since criminal charges are not the subject of arbitration, and any infliction of criminal punishment upon an individual, except in pursuance of the law of the land is a wrong done to the State, whether the individual assented or not."

" 'In Law v. United States, 169 Fed. 86, 94 C. C. A. 1st (1939), Mr. Justice Lurton said:'

" 'The right to waive a right does not exist where the mater concerns the public as well as the individual * * *'

" '* * * It is not competent for the accused and the district attorney to change by consent the constitution of the tribunal provided for trial of crimes. Between the waiver of a jury in a civil case and its waiver in a trial for crimes there are fundamental differences. The one involves only property rights of the parties, rights over which they have dominion. The other involves the liberty

or life of the ctizen. This is a matter over which the accused has not dominion. The State, the public, are concerned that neither shall be affected save by due process of law.' ''

"It may be conceded", continues Judge Rogers in *Freeman v. United States,* page 747: "too, that the right to a jury trial may be waived in trials of persons accused of minor offenses. The constitutional provisions do not extend the right to a jury trial. They only secure it in the cases in which it was a matter of right of common law. Cooley on Constitutional Limitation (7th Ed.) p. 590. Thus in Schick v. United States, 195 U.S. 65, 24 Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585 (1904), the Supreme Court held that a written waiver of a jury by a person prosecuted by information for the violation of a revenue statute was not in conflict with the constitution of the United States, providing that the trial of all crimes shall be by jury. The decision went upon the ground that the constitutional provision did not apply to petty offenses, and, that being the case, no reason existed why the defendant could not waive trial by jury and consent to trial by the court." (IN A PETTY CASE.)

Circuit Judge Rogers goes into page after page of authorities upon this point and clearly, but firmly, illustrates why one charged with a crime CANNOT WAIVE HIS RIGHT OF TRIAL BY JURY. This case has been cited with approval twelve times since its rendition, and has never been modified, criticized, or expressly overruled.

Many authorities hold that the point was necessarily settled by the Supreme Court in

Patton v. United States, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263.

This conception seems to be a misapprehension as to the applicable facts.

The defendant with his co-defendants were on trial in the District of Oklahoma. During the process of the trial one juror took sick and was excused. The defendants, after a consultation with the judge, district attorney and counsels for defense, all agreed to proceed with an eleven man jury. But the defendants, individually, SIGNED SUCH A WAIVER IN WRITING WITH THE APPROVAL OF THE JUDGE PRESIDING.

Upon the appeal of the case, the Appellate Court did not feel capable of answering the question, so it was certified to the United States Supreme Court, which held, in substance, that the accused might lawfully consent to a jury of less than twelve.

Practically there is much difference between being tried by a jury of eleven, or six, or for that matter even three, and being tried by a judge. The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they

came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove: and this introduces a slack into the enforcement of law and justice, tempering its rigor by the mollifying influence of current ethical convention. A trial by any jury, however small, preserves both of these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree.

Be that as it may, in any event the court in *Patton v. United States,* supra, was plainly concerned to protect even that measure of surrender which had been made in the case before it, as a competent waiver of a constitutional right EXPRESSLY MADE IN WRITING. They meant the consent to be jealously scrutinized; they did not mean to impose upon the defendants the same responsibility for their choice as rests upon them in ordinary affairs. It appears that we should treat it as a critical circumstance—at least when the accused's right to any jury whatever is denied.

To continue with the Supreme Court's opinion in *Patton v. United States,* page 254:

> "Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved,

> but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our tradition that before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant * * *."

The gist of the ruling in this case, supra, *Patton v. United States,* is—that—

> "an accused charged with a serious federal crime may dispense with his constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the government also consents, and where such action is approved by the responsible judgment of the trial court. But whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case."

In the instant case the appellant was denied this self-protecting shield, and in a unique, subtle way was swiftly pronounced guilty.

The *Patton* case has been cited as a finality and the law upon the subject. It has often been quoted whenever such a controversy arose. It has never been modified, reversed, disapproved, criticized or expressly overruled. It is quoted extensively in the dissenting opinion in the case following.

A lot of legal publicity has been allotted to the case of

Adams v. United States, 63 S. Ct. 241.

The facts are as follows:

McCann, himself a law student, charged with using the mails to defraud, moved to have the case tried without a jury by the judge alone. There was a brief discussion between the court, the petitioner, and Assistant United States Attorney, after which McCann submitted the following over his signature:

> "I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the court of my constitutional rights."

The Assistant United States Attorney consented and the judge (one of long trial experience and tested solicitude for the civilized administration of criminal justice) entered an order approving this "waiver".

The Circuit Court of Appeals, Second Circuit reversed the lower court 126 F. (2d) 774, holding at page 775:

> "It will have been at once observed that if the right of trial by jury is one which the accused may surrender as he may surrender any other privilege or right, the relator unconditionally surrendered it. Not only did he do this expressly after his rights had been explained to him, and never afterwards recant; but he was actually the moving party, for it was he who asked the judge to try him. Furthermore, there is reason

to suppose that in fact he did not suffer by submitting his guilt to a judge rather than a jury—but has an accused,—the power at his own instance to surrender his right to trial by jury when indicted for felony? Since the case of *Patton v. United States,* 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263, the surrender of that right has not been before the Supreme Court, but we are to assume that, that decision is still law, at least as to the point actually decided, which was that the accused might lawfully consent to a jury of less than twelve—eleven as it it chanced. It is quite true that the opinion proceeded upon broader grounds.

"* * * Limiting ourselves therefore to the exact situation before us, we hold that when on trial for a felony, the accused—at least when not himself a lawyer—may not consent to be tried by a judge." Relator discharged.

The Supreme Court (63 S. Ct. 236) reversed the above decision holding in substance:

"The relation of trial by jury to civil rights—especially in criminal cases—is fully revealed by the history which gave rise to the provisions of the Constitution which guarantee that right. Article III, Section II, Clause III; Sixth Amendment; Seventh Amendment. That history is succinctly summarized in the Declaration of Independence in which complaint was made that the Colonies were deprived 'in many cases, of the benefits of trial by jury,' but procedural devises rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code,

but in order to assure fairness and justice before any person could be deprived of 'life, liberty, or property.''

In the same opinion Mr. Justice Douglas (63 S. Ct. page 243), dissenting, states in part:

"The Patton case—supra, held that a defendant represented by counsel might waive under certain circumstances trial by a jury of twelve and submit to trial by a jury of eleven. In view of the strictness of the constitutional mandates I am by no means convinced that it followe that an entire jury may be waived * * *.

"Furthermore, the right to trial by jury, like the right to have the assistance of counsel, is 'too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.'

"Moreover, as Judge Learned Hand stated in the court below (126 F. (2d) 774, 776), the answer to the question whether the waiver was intelligent should hardly be made to depend on 'the outcome of a preliminary inquiry as to the competency' of the particular layman. If this constitutional right is to be jealously protected, there should be a reliable objective standard by which the trial court satisfies itself that the layman who waives trial by jury in a case like this has a full understanding of the consequences.

"The question for us is not whether a judge be trusted as much as a jury to determine the question of guilt. We are dealing here with one of the great historic civil liberties—the right to trial by

jury. Article III, Sec. II and the Sixth Amendment which grant that right contains no exception, though a few have been implied. See Ex parte Quirin, 317 U. S. ....., 63 S. Ct. 2, 87 L. Ed. ..... We should not permit the exceptions to enlarge by waiver unless it is plain and beyond doubt that the waiver was freely and intelligently made.

"The fact that a defendant ordinarily may dispense with a trial by admitting his guilt is no reason for accepting this layman's waiver of a jury trial. What the Constitution requires is that the 'trial' of a crime 'Shall be by jury.' Art. III, Sec. II, and it specifies the machinery which shall be employed if a plea of not guilty is entered and the prosecution is put to its proof * * *."

Mr. Justice Murphy, also dissents in the same case, *Adams v. U. S.,* 63 S. Ct., at page 245. He states:

"The Constitution provides: 'The trial of all crimes, * * * shall be by jury; * * *' (Article III, Sec. II), and: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, * * *.' (Amendment VI.) Because of these provisions, the fundamental nature of jury trial, and its beneficial effects as a means of leavening justice with the spirit of the times is admirably stated by Judge Learned Hand below, 126 F. (2d) 774, 776. I do not concede that the right to a jury trial can be waived in criminal proceedings in the federal courts. Whatever may be the logic of the matter, there is a considerable practical difference between trial by

> eleven jurors, the situation in *Patton v. United* States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263, and trial to the court, practicality is a sturdy guide to the preservation of Constitutional guaranties."

This case, *Adams v. United States,* is used by appellant, chiefly because of the waiver signed by McCann, which we quoted on page 38, supra.

Appellant respectfully wishes to call the Honorable Court's attention, to this signed waiver, and also the one in the *Patton* and *Schick* cases; all three being classified as a competent, intelligent waiver of a known right. This cannot be said of the instant case (T. 14), neither can it be said this appellant was informed as to the rights available to him.

The Honorable Circuit Judge Hutcheson, of the Fifth Circuit Court of Appeals, said in *Dillingham v. United States,* 76 F. (2d) 36 at page 39:

> "When, as here, defendant brings up a record which shows that he has not had the trial by jury which the Constitution guarantees, if waiver is relied on for affirmance, * * * the record must clearly show that the waiver was formally and legally obtained upon a full explanation and understanding of his rights. It must show, too, that the following trial has been a fair one, conducted with a scrupulous regard for defendant's legal rights."

CONCLUSION.

In point one appellant has shown how the issue raised by his petition for Habeas Corpus was circumvented by the United States District Court for the Northern District of California.

In point two he factually showed how this District Court sanctioned a procedure unknown in Habeas Corpus proceedings.

In point three he authoritatively showed, so we feel, abundant reason why, under the given circumstances of this case, a jury trial could not be waived in this appellant's case. He did not enter into any stipulation to waive a jury: nothing was explained to him; neither had he a sufficient understanding of his rights, and the court acted under circumstances which deprived his assent of that free volition essential to a jury waiver. The whole proceeding was in aberration from trial rules; it was so lacking in the essentials of a fair trial, and especially in those safeguards to which a defendant is entitled; that the stigma of a grave travesty upon appellant's constitutional right is apparent.

IT IS TO BE REMEMBERED THE RECORDS ARE ABSOLUTELY BARREN OF ANY INTELLIGENT, COMPETENT, OR VOLUNTARY WAIVER OF TRIAL BY JURY MADE BY THIS APPELLANT.

Appellant respectfully wishes to submit, that it is his belief, the facts and the laws involved, warrant a remand, and entitles him to a hearing for the ascertainment of the issue, in conformity with the prayer in his original petition for the writ of Habeas Corpus.

Dated, Alcatraz Island, California,
March 19, 1945.

RALPH SWIHART,
Appellant in Propria Persona.